

MILITARY DEPARTMENT
OFFICE OF THE ADJUTANT GENERAL
9800 Goethe Road - P.O. Box 269101
Sacramento, California 95826-9101



CAAG

29 June 2011

MEMORANDUM FOR Servicemembers and Employees of the California Military Department

SUBJECT: Report Fraud, Waste and Abuse

1. References:

- a. Department of Defense Directive #7050.06 Military Whistleblower Protection, dated 23 July 2007
- b. Department of the Army Judge Advocate Information Paper dated 13 June 2008 (attached)
- c. AR 600-20, Army Command Policy, dated 27 April 2010, Paragraph 5-12, Military Whistleblower Protection Act

2. It is your responsibility as a Servicemember and/or government employee to report any type of fraud, waste or abuse in order to ultimately protect scarce budget dollars. It is incumbent upon all members of the organization to responsibly account for and report any misuse or abuse of department funds and property. The California Military Department Inspector General (MDIG) and the California State Auditor are the confidential avenues for reporting any type of improper activities by state agencies or employees. The California National Guard Inspector General (CNG IG) is the confidential avenue for reporting any type of improper activities by federal agencies or employees.

3. If you report an impropriety, you are protected by the Whistleblower Protection Act, which:

- a. Requires the State Auditor, the MDIG, and the CNG IG to protect your identity (except from law enforcement).
- b. Prohibits intimidation, threats, or coercion by state government employees that could interfere with your right to disclose improper governmental activities.

4. How to Report: State Civil Service employees and State Active Duty Servicemembers within the Military Department have multiple ways to confidentially report information of fraud, waste and abuse. The MDIG is available to all State employees and Servicemembers and can be contacted via the State Military Department IG Hotline at (toll free) (888) 645-0411 or (916) 854-3692.

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5. Should you desire to contact the California State Auditor directly:

a. Call the Whistleblower Hotline at: (toll free) (800) 925-5655; (TTY) (866) 293-8729; or (916) 332-2603.

b. Mail information to: Investigations, Bureau of State Audits, California State Auditor, 555 Capitol Mall, Suite 300, Sacramento, CA 95814.

c. Submit complaints online to: <http://www.bsa.co.gov/hotline/filecomp> (Note: complaints not accepted via email).

6. Within the State Military Department, there are also Federal Inspectors General that are concerned with issues and requests for assistance related to: all Traditional and M-Day Guardsmen in the Air and Army National Guard; all Title 32 USC AGR and Federal Technician Personnel (military and civilian) whether assigned to an Air or Army National Guard unit, activity, installation, or at the State Military Department; and, all federal processes and activities. The Federal Inspectors General telephone number is (916) 854-3580 and their facsimile telephone number is (916) 854-3597. The Federal Inspectors General website address is <http://www.calguard.ca.gov/ig>. The Department of Defense fraud, waste and abuse hotline is: (800) 424-9098.

7. The State Ethics Advisor is the department official responsible for questions regarding any ethical issues or inquiries. If you have questions regarding governmental ethics, contact Colonel Matthew Dana at (916) 854-3505.

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DAVID S. BALDWIN
Major General
The Adjutant General

INFORMATION PAPER

DAJA-AL
13 June 2008

SUBJECT: The Military Whistleblower Protection Act (MWPA)

1. Purpose. To provide senior leaders information about the MWPA.

2. Facts.

a. The MWPA is codified at 10 U.S.C. § 1034. The MWPA prohibits officials from restricting a Soldier's lawful communications to a Member of Congress (MOC), an Inspector General (IG), or certain investigating agencies or personnel. Furthermore, no person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, as a reprisal against a Soldier for making or preparing a protected communication.

Practice Tip: *Similar statutory protections are provided to civilian employees, non-appropriated fund activity employees, and contractor employees. (See e.g., 5 U.S.C. § 2302, and 10 U.S.C. §§ 1587 and 2409). Senior leaders should review these authorities before taking any adverse action against any non-Soldier employee who has made a protected communication.*

b. Department of Defense Directive (DoDD) 7050.06, which implements the MWPA within the DoD, broadly defines a "restriction" as "[p]reventing or attempting to prevent member of the Armed Forces from making or preparing to make lawful communication to Members of Congress and/or an IG." Examples of this include statements to a Soldier that "if you go to the IG, I can arrange your move from this unit," and ordering a Soldier to not attend a MOC visit in theater out of fear that the Soldier would raise certain issues with the MOC.

c. The MWPA establishes two types of protected communications:

(1) Any lawful communications to a MOC or an IG; and

(2) A communication in which a Soldier communicates information that he/she reasonably believes evidences a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to any of the following:

(a) A MOC, an IG, or a member of a Department of Defense (DoD) audit, inspection, investigation, or law enforcement organization.

(b) Any person or organization in the chain of command; or any other person designated pursuant to regulations or other established administrative procedures to receive such communication.

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d. The MWPA does not define a "personnel action." However, Department of Defense Directive (DoDD) 7050.06, which implements the MWPA within the DoD, broadly defines a "personnel action" as any action taken on a Soldier that affects or has the potential to affect that Soldier's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluation under the provisions of DoDD 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's rank. Moreover, reprisal is defined as "taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making or preparing a protected communication."

e. Similarly, the MWPA does not define "chain of command." DoDD 7050.06, however, defines "chain of command" as "not only the succession of commanding officers from a superior to a subordinate through which command is exercised, but also the succession of officers, enlisted members or civilian personnel through whom administrative control is exercised, including supervision and rating of performance."

f. Investigation Procedures.

(1) In accordance with AR 20-1, MWPA allegations involving senior Army officials must be forwarded to the Department of the Army Inspector General (DAIG) for investigation. DoDD 7050.06 defines "Senior Official" to include "[a]ctive duty, retired, Reserve, or National Guard military officers in grades O-7 and above, or selected for promotion to grade O-7" and "current or former members of the Senior Executive Service." The DAIG is required to expeditiously determine whether there is sufficient evidence to warrant an investigation of the allegation. Determinations by the DAIG that there is insufficient evidence to warrant an investigation must be forwarded to the Department of Defense Inspector General (DoDIG) for review.

(2) Army IGs receiving MWPA allegations involving non-senior Army officials must forward this information to the DoDIG, through the Army Whistleblower Investigation and Oversight Branch (WIOB), for a determination whether there is sufficient evidence to warrant investigation of a reprisal allegation. Where an investigation is warranted, the DAIG is required to expeditiously investigate the allegation. The DoDIG is the final approval authority for all MWPA investigation results.

g. MWPA investigators are directed to focus on the following four questions:

(1) Did the Soldier make or prepare a protected communication?

(2) Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or was there a threat to withhold such action following the protected communication?

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(3) Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the protected communication?

(4) Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

h. Once a senior leader becomes aware that a Soldier has made a protected communication, the burden shifts to that senior leader to demonstrate that any unfavorable personnel action (or withholding a favorable personnel action) would have occurred regardless of the protected communication.

Practice Tip: *Answering the first three questions is relatively straightforward. The fourth question is more difficult as it often requires an investigator to discern the official's intent for his or her actions. The Inspector General Department of Defense Guide (IGDG) 7050.6 requires investigators to answer whether the complainant would "be in the same position today if he or she had not made or prepared a protected communication." If the answer to this question is "no," a MWPA allegation will likely be substantiated. For example, in one case a company commander alleged to CID that his battalion executive officer directed him and his fellow company commanders to engage in improper supply requisition procedures during a deployment. When the company commander was asked by CID why he reported the allegation to CID, as opposed to his chain of command, the company commander replied that he did not "trust" his battalion or brigade commanders. The company commander was subsequently reassigned from command early, based on the direction of the Commanding General. When investigated, the Commanding General testified that he had not directed the company commander's removal because he had made a protected communication. Instead, the Commanding General testified that the officer had been removed because the Commanding General lost "trust and confidence" in the company commander because the officer did not "trust" his chain of command. Nevertheless, the MWPA allegation was substantiated because the investigator determined that the company commander would not have been reassigned early had he not made his protected communication to CID.*

i. MWPA Sanctions.

(1) MWPA violations may result in criminal prosecution or other adverse administrative action.

(2) Substantiated MWPA allegations are recorded in the DAIG and DoDIG databases. Such information will be considered by general officer promotion selection boards and will be forwarded to Congress when an individual is considered for Senate confirmation.

j. The MWPA is not intended to immunize individuals who make protected communications from adverse actions for their misconduct or poor performance. However, where a protected communication has been made, it is critical that senior leaders be able to **document** that any

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adverse action would have occurred regardless of the protected communication. Since senior leaders will be accountable for such decisions, they should consult the appropriate members of their staff (e.g., SJA and IG) before taking action.